Supreme Court, U.S.
FILED
JAN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1162

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

FLOYD H. DANIELS,

Appellant and
Petitioner,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; HARRY HANDLER, SUPERINTENDENT OF SCHOOLS, In His Official Capacity,

Appellees and
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED

The questions presented for review, are as follows:

A. Whether the Court of Appeals improperly denied the Petition for Rehearing, and rejected the suggestion for a Rehearing En Banc?

B. Whether Petitioner's Motion For Reconsideration, Motion To Grant Leave to File Second Amended Complaint and Lodged Second Amended Complaint, that were filed in the District Court on April 11, 1984, were filed correctly, and within the specified time?

C. Whether Petitioner's Second Amended Complaint Under the Jurisdictions of Title 42, U.S.C., Sections 1981, and 1983; Fourteenth Amendment; and 339(1) C.C.P., States A Claim Upon Which Relief Can be Granted?

E. Reasons Why Questions Presented are Substantial and require Plenary Consideration.

PARTIES TO THE ACTION

1. FLOYD H. DANIELS, Petitioner herein
2. LOS ANGELES UNIFIED SCHOOL DISTRICT; HARRY HANDLER, Superintendent of Schools; LOS ANGELES SCHOOL BOARD OF EDUCATION; RITA WALTERS, President; DR. ROBERT KLADIFKO, Principal; DAVID WINTERS, Assistant Principal; RON APPERSON, Legal Adviser To Los Angeles School Board, Parties herein in the capicity sued.
3. DE WITT CLINTON, MARTIN E. WEEKES, Los Angeles County Counsel's Office, as attorney for respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

FLOYD H. DANIELS,

Appellant and Petitioner,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; HARRY HANDLER, SUPERINTENDENT OF SCHOOLS, In His Official Capacity,

Appellees and Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, FLOYD H. DANIELS, petitions for a Writ of Certiorari to Review the Order of the United States Court of Appeals for the Ninth Circuit that was filed on November 19, 1985, in

which Appellant's Petition For Rehearing, and Suggestion For Rehearing En Banc, was denied and rejected. Appellant filed Petition For Rehearing on September 24, 1985. The above stated denial, and rejection, thereby, affirmed the United States District Court, for the Central District of California's Final Order, wherein, Petitioner's Motion For Reconsideration; Motion To Grant Leave to File Second Amended Complaint; and Second Amended Complaint were denied in a Final Order, filed on June 15, 1984.

OPINIONS BELOW

The Memorandum Opinion, and Order of the Court of Appeals are reproduced in Appendix A, and B, to this Petition. Also, the District Court's Final Order is reproduced in Appendix C.

///////

JURISDICTION

The Order of the Court of Appeals was filed on November 19, 1985. (See Appendix A.) This Petition for a Writ of Certiorari is filed within ninety days of that date. (28 U.S.C., Section 2101(c).) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

The principal Constitution provision is the Fourteenth Amendment of the United States Constitution. Also, addressed are the proper application of Title 42, U.S.C., Section 1981; and Title 42, U.S.C., Section 1983. Also, addressed is the proper application of Rule 15(a) and (b) Title 28, Federal Rules of Civil Procedure. Also, addressed is the proper application of

the California Code of Civil Procedure, 339(1). These provision are set out in this Petitior when it is appropriate to do so.

STATEMENT OF CASE

Petitioner is a Black School Teacher employed by the Los Angeles Unified School District. In February, 1983, Petitioner decided to take an examination for the position of Assistant Principal. Petitioner sought "enthusiatic" Reference Endorsements from six (6) Principals, and Assistant Principals that Petitioner had previously worked, or was presently working with, in Petitioner's Teaching Profession. Principal Kladifko(Caucasian) and Assistant Principal Winters(Caucasian) promised "enthusiatic" Reference Endorsements, but they willfully and deliberately "breached their "Oral Contracts" with

Petitioner by submitting less than satisfactory Reference Endorsements because Petitioner was a Black Man. This Racial Discrimination in Promotional Teachers Employment. Also, Petitioner was Racial Discriminatory denied his Rights by permitting Petitioner to have only four (4) "enthusiatic" Reference Endorsements, while other Applicants who took, and passed the Assistant Principal Examination, had the Right, Privileges to have six (6) "enthusiatic" Reference Endorsements. This denied Petitioner the "Equal Protection of the Laws".

On November 11, 1983, Petitioner wrote a letter to Superintendent, Handler, and Board of Education. Petitioner requested, and asked the Superintendent, and Board of Education to correct the above stated Racial Discrimination by putting Petitioner's Name in the "upper

one-tenth of the Roster for the up, and coming Assistant principals' Roster". The superintendent, and Board of Education refused Petitioner's request in a letter, dated November 29, 1983, thereby, condoning, and accepting the above stated Racial Discrimination, and denial of the "Equal Protection of the Laws" in Promotional Teachers Employment.

Appellant filed a Complaint in the District Court on January 12, 1984.

ARGUMENT

Petitioner present the following argument in his behalf:

I.

WHETHER THE COURT OF APPEALS IMPROPERLY DENIED THE PETITION FOR REHEARING, AND REJECTED THE SUGGESTION FOR A REHEARING EN BANC?

The Court of Appeal have questioned the timeness of Petitioner's Motion For

Reconsideration, Motion For Leave To File A Second Amended Complaint, and lodge a Second Amended Complaint in the District on April 11, 1984. and has used this ground to affirm the District Court's Final Order that was filed on June 15, 1984. (See Memorandum, Apendix B).

II.

WHETHER PETITIONER'S MOTION FOR RECONSIDERATION; MOTION TO GRANT LEAVE TO FILE SECOND AMENDED COMPLAINT; AND, SECOND AMENDED COMPLAINT THAT WERE FILED IN THE DISTRICT COURT ON APRIL 11, 1984, WERE FILED CORRECTLY, AND WITHIN THE SPECIFIED TIME?

Petitioner filed a Complaint in the District Court on January 12, 1984.

United States Magistrate, Joseph Reichmann's Proposed Recommendation to dismiss was filed on January 16, 1984.

Petitioner filed a first Amended Complaint in the District Court on January 23, 1984, pursuant to Title 42,

U.S.C., Section 1983, and Fourteenth Amendment.

The Magistrate wrote a recommendation to dismiss, and filed recommendation to dismiss on January 24, 1984, using the ground of Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971) to dismiss Petitioner's Complaint.

Petitioner filed a Memornadum of Authorities on February 1, 1984, substantaiting that the above stated Case, Hesselgesser v. Reilly did not bar Petitioner's Complaint.

The District Court filed and Order March 21, 1984, dismissing Petitioner's First Amended Complaint for failure to state a claim, "but on different ground of those recommended by the Magistrate". The "different ground" was in the very same Order to Dismiss, without giving Petitioner the Right, and Privilege to

give a written response to the "different grounds". This denied Petitioner the "Equal Protection of the Law", without "Due Process of Law", guaranteed by the 14th Amendment of the United State Constitution.

The above stated District Court's Order to Dismiss Petitioner First Amended Complaint that was filed on March 21, 1984, was not a "Final Order" from which appeal could be taken.

The Court of Appeals for the Ninth Circuit, held:

> "Since complaint would still be open to amendment, dismissal of complaint, without dismissal of action was not a "final order" from which appeal could be taken. Fed.Rules Civ. Pro. rule 12, 28 U.S.C.A. 1291."
>
> Dockery v. Dockery
> 437 F.2d 898 (9th Cir. 1971).

The United States Court of Appeals for the Ninth Circuit, again, held:

"Dismissal of complaint without dimissal of action is not a final order because complaint is still open to amendment. 28 U.S.C.A. 1291."

Hurst v. State of California
451 F.2d 350 (9th Cir. 1971).

Based upon the above Ruling by the Court of Appeals for the Ninth Circuit, the above District Court's Order to Dismiss Petitioner's Complaint on March 21, 1984, was not a "Final Order", and could not have become a "Final Order" for thirty (30) days.

Petitioner filed Motion for Reconsideration; Motion For Leave to File A Second Amended Complaint, and Lodged in the District Court on April 11, 1984. on the ground that Petitioner had been denied the "Due Process of Law", guaranteed by the 14th Amendment of the United States Constitution. Petitioner filed the above stated Motions pursuant

to Rule 60(b(1) and Rule 15(a) and (b) Title 28, Federal Rules of Civil Procedure. Petitioner filed Motions pursuant to Local Rule 7.16 of the District Court.

The District Court's Order to Dismiss Petitioner's Complaint was filed in the District Court on March 21, 1984. Petitioner filed the above stated Motions in the District Court on April 11, 1984, well within the thirty (30) days before the above stated District Court's Order to Dismiss was to become a "Final Order".

Petitioner filed the above stated Motion For Leave To Amend to conform to the evidence, and establish jurisdictions under Title 42, U.S.C., Section 1981; Title 42, U.S.C., Section 1983; 14th Amendment of the United States Constitution; and, 339(1) C.C.P., pursuant to Rule 15(b) Title 28, Federal Rules of Civil Procedure, as follows, in pertinent

part:

"(b). Amendments to conform to Evidence."

"When issues not raised in the pleading are tried by express or implied consent of parties they shall be treated in all respect as if they had been raised in the pleadings, such amendment of the pleadings may be necessary to cause them to conform to the evidence and to raise these issues may be made upon any party at any time even after judgment."

To establish jurisdictions:

"Leave to amend pleading should be freely granted when necessary to establish jurisdiction."

United Steelworkers of America AFL-CIO v. Masker Bros. Ind. Inc., 457 F.2d. 91 (8th Cir. 1972).

To establish jurisdiction of the

"Equal Protection of the Laws":

"Upon remand, plaintiff could as a matter of course amend her civil rights complaint to allege violation of equal protection Clause."

Betts v. Board of Ed., City of Chicago, 466 F.2d., 629, (7th Cir. 1972).

Also:

> "Leave to amend should be allowed unless complaint cannot under any conceivable state of facts be amended to state a claim."
>
> Breier v. Northern Cal., Bowling Proprietors Ass'n, 316 F.2d, 787 (9th Cir. 1963).

Based upon the above, Petitioner has filed Motion For Reconsideration; Motion For Leave To File A Second Amended Complaint; and Lodged Second Amended Complaint, in the District Court on April 11, 1984, correctly, and within the specified time.

III.

WHETHER PETITIONER'S SECOND AMENDED COMPLAINT UNDER THE JURISDICTIONS OF TITLE 42, U.S.C., SECTION 1981; TITLE 42, U.S.C., SECTION 1983; FOURTEENTH AMENDMENT; AND 339(1) C.C.P., STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

1. TITLE 42, U.S.C., SECTION 1981.

Principal Kladifko(Caucasian) and

Assistant Principal Winters(Caucasian) breached the Oral Contracts with Petitioner on May 23, 1983, and May 24, 1983, by willfully and deliberately giving Petitioner(Black) unsatisfactory Reference Endorsements because Petitioner was a Black Man.

As a result of the above stated Oral Breach of Contracts, I, FLOYD H. DANIELS, Black(Negro Decent) Petitioner, Teacher, and a Citizen of these United States of America, has been Racially Deprived of my Rights under color of Law, by the Denial of "Equal Protection of the Law", without "Due Process of Law", guaranteed by the 14th Amendment of the United States Constitution. This is Racial Discrimination in Private Promotional Teachers Employment, pursuant to Title 42, U.S.C., Section 1981, as follows:

"All person within the Jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts,to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind, and to no other. R.S. 1977."

The Court of Appeals for the Fourth Circuit, held:

"While courts will review denials of promotion where the action was tainted by racial or sex discrimination or was intended to penalize for the exercise of First Amendment rights."

Clark v. Whiting, 607 F.2d., 634 (4th Cir. 1979).

This United States Supreme Court, Ruled:

"B. Title 42, U.S.C., Section 1981, being the present codification of one of the centry-old Civil Rights Acts of 1866, 14

Stat. 27, on the other hand, on its face relates primarily to racial discrimination in making and enforcement of contracts. Although this court has not specifically so held, it is well settled among the federal courts of appeals -- and we now join them -- that 1981 affords a federal remedy against discrimination in private employment on the basis of race. An Individual who establishes a cause of action under 1981 is entitled to both equitable and legal relief, including compensatory and under certain circumstatces, punitive damages."

Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

This Supreme Court, again, Ruled:

"Title 42, U.S.C., 1981 provides in pertinent part that all persons within the Jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts.... as is enjoyed by white citizens... We have previously held where discrimination against Negroes was in question, that 1981 afford a federal remedy against discrimination in private employment on the basis of race, and respondents do not contend otherwise."
McDonald and Laird v. Santa Fe Trail Transportation Co., et al., 427 U.S. 273, (1976).

Petitioner has the Right to file this Racial Discrimination in the Federal Court, pursuant to Title 42, U.S.C., Section 1981.

The Court of Appeals for the Third Circuit, held:

> "We conclude that nothing in Title VII of the Civil Rights Act of 1964, imposes any jurisdictional barrier to a suit brought under Section 1981 charging discrimination in private employment."
>
> Young v. International Telephone and Telegraph Co., 438 F.2d., 757 (3rd. Cir. 1971).

This Supreme Court, Ruled:

> "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the agrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. 'The legislative history of Title VII manifest a congressional intent to allow an individual to pursue independently his rights under both

Title VII and other applicable state and federal statutes."

Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

Therefore, Title VII of the Civil Rights Act of 1964, do not have any jurisdictional barrier to Title 42, U.S.C., Section 1981.

Based upon the above, Petitioner is entitle to legal relief under the jurisdiction of Title 42, U.S.C., Section 1981.

2. FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As a result of the two (2) Oral Breach of Contracts, Petitioner(Black) had only four (4) "enthusiatic" Reference Endorsements, while other Applicants who took, and passed the Assistant Principal Examination, had the Right and Privilege to have six (6) "enthusiatic" Reference Endorsements. This denied Petitioner the "Equal Protection of the Law', without

"Due Process of Law', secured by the Fourteenth Amendment of the United States Constitution, as follows:

> "All persons born or naturlized in the United States, subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."
>
> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction of the equal protectin of the laws."

The above 14th Amendment guarantees the Rights for all United States Citizens.

3. TITLE 42, U.S.C., SECTION 1983.

On November 11, 1983, Petitioner wrote a letter to Superintendent, Handler, and the Board of Education. Petitioner requested, and asked the Superintendent, and Board of Education to correct the Racial Discrimination by the followings:

"As a result of this Racial Discrimination in Employment, I am asking you to correct this Racial Discrimination by putting my Name, Floyd H. Daniels, #153558, in the upper one-tenth of the Roster of the up, and coming Assistant Principals Roster."

Attorney Ron Apperson, Legal Advisor for the Board of Education, denied Petitioner's above stated, and quoted request in a letter to Petitioner, dated November 29, 1983.

As a result, Petitioner was Racially Discriminatory Deprived of his Rights, as a Citizen, and a Teacher, Under Color of Law, Pursuant to Title 42, U.S.C., Section 1983.

Title 42, U.S.C., Section 1983, as follows:

"Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons

within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The United States Court of Appeals for the Fourth Circuit, held:

"This section was designed to provide a comprehensive remedy for deprivation of constitutional Rights."

Smith v. Hampton Training School For Nurses, 300 F.2d., 577 (4th Cir. 1966).

The United States Court of Appeals for the Ninth Circuit, held:

"Compensatory damages awardable in a Civil Rights Act Case are not limited to the out-of-pocket pecuniary loss suffered by complaint and may be awarded for emotional and mental distress caused by intentional tort."

Donovan v. Reinbold, 433 F.2d., 738 (th Cir. 1970).

Based upon the above, Petitioner has been racially discriminatory deprived of

Petitioner's Rights, as a Citizen, under color of Law, pursuant to the above quoted Title 42, U.S.C., Section 1983; and Title 42, U.S.C., Section 1981, by denying Petitioner the "Equal protection of the Law", without "Due Process of Law", secured by the 14th Amendment of the United States Constitution.

Therefore, Petitioner has been "deprived of a Right secured by the Constitution and Laws .

In support of the above, this United States Supreme Court, Ruled:

> "For Section 1983 imposes liability only upon one 'who, under color of any statute, ordinance, regulation custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws.....'
> The first inquiry in any

> Section 1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the constitution and laws."
>
> Baker v. McCollan, 443 U.S. 137-56 (1975)

4. CALIFORNIA TORT CLAIM ACT.

The Ninth Circuit Court of Appeals, held:

> "Provisions of California Tort Claim Act requiring presentation of claim to public entity within 100 days after accural of cause of action and commencement of action within six months after claim has been acted upon would not be applied to impair federally created right of plaintiff to recover from police officer for acts allegedly committed under color of state law to deprive plaintiff of right to bail because he was a Negro."
>
> Willis v. Reddin 418 F.2d. 702 (9th Cir. 1960).

5. STATUTE OF LIMITATION.

The California Code of Civil Procedure, Section 339(1) as follows, in pertinent part:

"Within two years:

(1) An action upon a contract, obligation or liability not founded upon instrument of writing....."

The Court of Appeals, for the Ninth Circuit, held:

"Since federal Civil Rights Acts contain no provision limiting time within which action thereunder may be brought, applicable period of limitation is that provided by state."

Smith v. Cremins, 308 F.2d., 187 (9th Cir. 1962).

The Court of Appeals for the Third Circuit, held:

"There is no federal statute of limitations applicable to 1981, and the federal courts would look to the most nearly analogous state statute of limitations."

Young v. International Telephone and Telegraph Co., 438 F.2d., 757 (3rd. Cir. 1971).

This United States Supreme Court, Ruled:

"A. Since there is not specifically stated or otherwise relevent federal statute of limitations for a cause of action under 1981, the controlling period would ordinarily be the most appropriate one provided by state law."

Johnson v. Railway Express Agency. 421 U.S. 454 (1975).

The two (2) Oral Breaches of Contract were breached on May 23, 1983; and May 24, 1983. Petitioner filed his Complaint in the District Court on January 12, 1984, well within the two (2) year statute of limitation of 339(1) C.C.P.

Based upon the above Petition, Petitioner has stated a Claim Upon Which Relief Can Be Granted.

IV.

REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL AND REQUIRE PLENARY CONSIDERATION

Petitioner has stated a Claim Upon Which Relief Can Be Granted in this Cause of Action.

The lower Courts have abused their discretions by denying Petitioner the "Equal Protection of the Laws", without "Due Process of Law", guaranteed by the 14th Amendment of the United States Constitution.

The 14th Amendment of the United States Constitution states, in pertinent part: "All persons.... are Citizens of the United States and of the state, wherein they reside."

Petitioner is very definitely, a part of the above quoted, "All persons... are Citizens of the United States", and resides in the State of California.

This Supreme Court has the Power, and Duty to Interpret, Uphold, and Protect the Constitution of the United States.

Petitioner has been racially deprived of His Rights under color of Law, pursuant

to Title 42, U.S.C., Section 1983; and Title 42, U.S.C., Section 1981, by the denial of the "Equal Protection of the Laws", without "Due Process of Law", secured by the 14th Amendment of the United States Constitution.

As a result, Petitioner has been deprived of a Right, "secured by the constitution and laws", Baker v. McCollan, 433 U.S. 137-56 (1979).

The above is very substantial, and require plenary consideration by this United States Supreme Court.

CONCLUSION

For the foregoing reasons, as stated in this Petition For A Writ of Certiorari, Petitioner respectfully request, and ask this United States Supreme Court to reverse the Order of the Court of Appeals for the Ninth Circuit, filed on November

19, 1985; and the Order of the District Court, filed on June 15, 1984. Petitioner respectfully request, and ask this Supreme Court to remand that the District Court issue an Order for a Pre-trial in this Cause of Action, in accordance with Local Rule #9; and, consistant with this United States Supreme Court's Opinion.

DATED: January 2, 1985.

Respectfully Submitted,

FLOYD H. DANIELS

In Propria Persona

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

FLOYD H. DANIELS,

Appellant and Petitioner,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; HARRY HANDLER, SUPERINTENDENT OF SCHOOLS, In His Official Capacity,

Appellees and Respondents.

APPENDIX

A. JUDGMENTS, AND FINAL ORDERS

1. Court of Appeals' Final Order, filed November 19, 1985, page 32
2. Court of Appeals' Memorandum, filed September 13, 1985, page 34

3. Federal District Court's Final Order filed June 15, 1984, page 34

APPENDIX A

FILED Nov. 19, 1985.

CLERK, U.S. COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLOYD H. DANIELS	)C.A. Nos.
	)
Plaintiff-Appellant,	)84-6047,
	)84-6070
vs.	)
	)D.C. Nos.
LOS ANCELES UNIFIED	)
SCHOOL DISTRICT, BOARD	)CV 84-0227-HLH
OF EDUCATION OF THE	)CV 84-0229-CBM
CITY OF LOS ANGELES,	)
et al.,	)ORDER
Defendants-Appellees.	)
	)

Before: TANG, POOLE and BEEZER, Circuit Judges.

The panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge in active service has requested a vote to rehear the matters en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX B

FILED September 13, 1985.

CLERK, U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FLOYD H. DANIELS Plaintiff-Appellant, vs. LOS ANGELES UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, et al., Appellees-Respondents	C.A. No. 84-6070 D.C. No. CV 84-0229-CBM MEMORANDUM*

On Appeal From the United States District Court for the Central District of California
The Honorable Consuelo B. Marshall District Judge, Presiding

Submitted -- June 17, 1985**

Before: TANG, POOLE and BEEZER, Circuit Judges,

Daniels claims that the district court abused its discretion by denying his motion for relief from judgment on the

basis of mistake. Fed. R. Civ. P. 60(b)(1) The alleged "mistake" was the district court's decision to dismiss Daniels' complaint under a theory that differed from the theory proposed by the Magistrate. The district court's decision did not constitute a "mistake."

Daniels also claims that the district court abused its discretion by denying his motion for leave to file a second amended complaint. Daniels did not file that motion until several weeks after the district court dismissed his complaint without leave to amend. In denying Daniels' motion, the district Court noted that the second amended complaint suffered from the same defects that led to the earlier dismissal. Under these circumstances, the district court did not abuse its discretion.

AFFIRMED.

*This diposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 3(f)."

APPENDIX C

grounds as set forth in this Court's Order entered March 22, 1984. As to plaintiff's claims under 42 U.S.C. $1981, the Court finds that plaintiff has failed to allege intentional racially discriminatory conduct on the part of any of the defendants and has failed to allege any disparate impact of defendants' racially discriminatory conduct,. Thus because plaintiff's proposed amendment is futle, the Court would deny the Motion for Leave to File a Second Amended Complaint.

The Court further finds that plaintiff's Motion for Reconsideration does not comply with Rule 7.16 of the Local Rules, which provides that a motion for reconsideration "may be made on the grounds of (a) material difference in fact or law from that presented to the Court before such decision that in the

exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such, or(c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral (r) written argument made in support of or in opposition to the original motion." Thus, the Court would deny plaintiff's Motion for Reconsideration.

For reasons stated above,

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration and Motion for Leave to File 2d Amended Complaint be denied.

DATED: June 15, 1984.

Hon. Consuelo B. Marshall,
Judge